

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

Oscar Fernandez, Individually and as
Administrator of the Estate of Isidro
Fernandez,

Plaintiff,

vs.

Tyson Foods, Inc.; Tyson Fresh Meats,
Inc.; John H. Tyson; Noel W. White;
Dean Banks; Stephen R. Stouffer; Tom
Brower; Tom Hart; Cody Brustkern;
John Casey; and Bret Tapken,

Defendants.

CASE NO. 20-cv-2079-MAR

**DECLARATION OF BARBARA MASTERS IN SUPPORT OF
TYSON'S RESISTANCE TO MOTION TO REMAND**

I, Barbara Masters, declare and state as follows:

1. I am the Vice President for Regulatory Policy for Food and Agriculture at Tyson Foods, Inc., which I understand is one of the defendants in this litigation. In my role, I oversee Tyson Foods' interactions with multiple federal regulators, including the United States Department of Agriculture. I make this declaration based on my personal knowledge. The information contained in this declaration is true and correct to the best of my knowledge, and I am competent to testify about the matters set forth herein.

Background

2. I have worked in the meat and poultry industry for more than thirty years, and I have held a wide variety of roles in both the public and private sectors during

that time. I began my career as a live animal veterinarian, and then spent seventeen years with the Department of Agriculture's Food Safety and Inspection Service ("FSIS"). At FSIS, I held numerous positions ranging from an in-plant public health veterinarian to the FSIS Administrator. When I left FSIS, I first worked as a senior policy advisor for a leading law firm in Washington, D.C.; I then became the global vice president for food safety and quality for a small food company.

3. I joined Tyson Foods in 2019 as Vice President for Regulatory Policy for Food and Agriculture, which is my current position. Tyson Foods produces more than 20% of the nation's daily supply of meat and poultry, enough to feed 60 million Americans each day. I am proud to be part of a company that is committed to feeding the public, and to doing so safely, during the coronavirus pandemic.

4. I have extensive experience with how the meat and poultry industry is regulated. Because of the unique nature of this industry, the need for uniform standards, and because of its critical importance to the national food supply, the federal government takes full responsibility for regulating meat and poultry processing companies. FSIS places food inspectors in every private commercial meat processing facility, and plants are not allowed to operate unless a federal food inspector is present. The Federal Meat and Poultry Products Inspection Acts make it illegal to operate in the absence of such inspection personnel.¹

5. The federal government's industry-wide control has been particularly evident during the coronavirus pandemic. On March 13, 2020, the federal government declared a national emergency, but at the same time defined "critical infrastructure"—including food and agriculture companies like Tyson Foods—and indicated that essential workers should be allowed to access their workplaces during times of

¹ <https://www.fsis.usda.gov/wps/portal/ffsis/topics/rulemaking/federal-meat-inspection-act>;
<https://www.fsis.usda.gov/wps/portal/ffsis/topics/rulemaking/poultry-products-inspection-acts>

community restrictions. It further stated that, “[i]f you work in a critical infrastructure industry, as defined by the Department of Homeland Security, such as healthcare services and pharmaceutical and food supply, you have a special responsibility.”² Since mid-March, my colleagues and I have worked hand-in-hand with, and followed the directions of, multiple federal agencies to ensure that Tyson Foods continues to operate in a safe manner for our employees during the pandemic as part of the nation’s critical infrastructure in the food and agriculture sector.

Tyson Foods’ Designation as Critical Infrastructure

6. On March 13, 2020, I learned that President Trump had declared a national emergency concerning the coronavirus pandemic, retroactive to March 1, 2020. *See* Exec. Office of Pres., *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,337, 15,337 (Mar. 13, 2020).

7. On March 13, I and other industry representatives participated on a conference call hosted by the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency (CISA). On the call, CISA officials asked what the agency needed to do to assist coordination between the government agencies and critical infrastructure industry on issues such as regulations, Personal Protective Equipment (PPE), and other priorities during the pandemic. My colleagues and I spent the next several days speaking with CISA about these issues, both by email and by telephone. Eventually our primary point of contact was the Deputy Assistant Director for the National Risk Management Center (NRMC) at CISA. Sample email correspondence between CISA and its NRMC officials and Tyson Foods are attached as Attachments A and B (March 15, 2020 and March 13, 2020 emails). We continue to meet with the Food and Agriculture sector of CISA. The next meeting will be held on

² <https://www.cisa.gov/news/2020/03/19/cisa-releases-guidance-essential-critical-infrastructure-workers-during-covid-19>

November 17-18, 2020.

8. I knew that Tyson's facilities were designated as "critical infrastructure," in particular because the Homeland Security Presidential Directive 7 (HSPD-7) established the U.S. national policy for identification of and prioritization for protection of critical infrastructure. This was signed by President George W. Bush on December 17, 2003, and included agriculture as one of the critical infrastructures. A copy of that directive is at Attachment C. I served in a senior leadership role at the FSIS at the time this was enacted and participated in meetings at that time regarding the meaning of this declaration. All components of the Food and Agriculture Sector are critical infrastructure, but the demands of any particular threat or emergency will dictate precisely what is required within a sector. For that, Tyson must coordinate with the federal officials overseeing critical infrastructure. The protection of critical infrastructure is the subject of extensive planning and coordination between federal agencies and private industry. The most recent plan is the Food and Agriculture Sector-Specific Plan from 2015, which states that the mission of the plan is "to protect against a disruption anywhere in the food system that would pose a serious threat to public health, safety, welfare, or to the national economy."³

9. In addition, my colleagues and I immediately began communicating with federal regulators, including officials at the Department of Agriculture and the Department of Homeland Security, about how the emergency declaration would affect Tyson Foods. I knew that Tyson would be able to continue operating as part of the nation's critical infrastructure, and we would be following the federal government's lead as to how continued operations should proceed. Further, with large portions of the country shutting down, having this designation as critical infrastructure from the federal government would be required in order to be allowed to continue operations.

³ <https://www.cisa.gov/sites/default/files/publications/nipp-ssp-food-ag-2015-508.pdf>. The mission statement is at page 13.

10. Since mid-March, my colleagues and I have been in constant contact with a variety of federal regulators about the coronavirus, Tyson's operations, and the scope of Tyson's critical infrastructure designation as it applies to particular employees to obtain the special permission needed and to continue operations. Those communications have continued as necessary throughout the pandemic.

Tyson's Communications with Federal Agencies

11. My colleagues and I were in contact with CISA and the NRMC. Those discussions centered on Tyson Foods' designation as critical infrastructure and the designation of particular employees. This included defining specific roles within Tyson such as truck drivers, distribution, feed mills, and rendering as part of the Food and Agriculture critical infrastructure. Each segment had to be specifically called out by CISA in order to be recognized at the individual state level where these employees worked.

12. One issue we identified early on was that state and local quarantine restrictions could affect the industry's ability to deliver food and supplies using commercial drivers. To address this concern, federal regulators designated key functions and employees as part of the "critical infrastructure." Thus, on March 13, the Department of Transportation issued a national emergency declaration that allowed commercial drivers to operate during the pandemic and provide "[f]ood for emergency restocking of stores."⁴

13. In order to continue operating, notwithstanding state and local lockdown orders and other restrictions, critical infrastructure designations flowed down to Tyson Foods' employees and suppliers who supported operations. Based upon federal critical infrastructure directions, covered employees received letters that authorized

⁴ <https://www.fmcsa.dot.gov/newsroom/us-department-transportation-issues-national-emergency-declaration-commercial-vehicles>

them to keep working, even if they were in a location that had state or local shelter in place orders. The employees were told to keep the letters on them at all times and to be prepared to show them to officials. A sample letter is attached as Attachment D along with the communication to suppliers.

14. Another area we worked closely with the Federal government was regarding PPE and critical supply needs. We received requests to identify our PPE needs through our trade association the North American Meat Institute that were funneled to the USDA so that all of industry would be represented in the request for PPE and critical supplies. We completed these requests and continued to have conversations with both USDA and the Federal Emergency Management Agency (FEMA) regarding our specific supply needs. Attachment E (April 1, 2020 and April 3, 2020 emails) and Attachment F (April 15, 2020 email). These conversations were in part to ensure our employees would be considered essential and the supplies we accessed would not be diverted.

15. On March 16, the White House issued Coronavirus Guidelines for America. Those guidelines stated directly: employees in “critical infrastructure industr[ies]” have a “special responsibility.” Exec. Office of Pres., *The President’s Coronavirus Guidelines for America*, Mar. 16, 2020, at 2. In their continued operations, critical infrastructure employers and workers “should follow CDC guidance to protect [their] health at work.” *Id.* Attachment G. Tyson invested enormous resources to follow evolving CDC guidance and continue operations, as directed by federal officials.

Tyson Foods’ Communications with FSIS

16. My colleagues and I are also in constant communication with officials from the Department of Agriculture and FSIS, including Paul Kiecker, the FSIS Administrator. The FSIS has a particular interest in Tyson Foods’ critical infrastructure operations because, notwithstanding the pandemic, FSIS plant inspectors continue to

work on-site at meat and poultry processing facilities across the country. FSIS hosted weekly calls with industry to share information and to respond to questions concerning the pandemic. These calls occurred throughout the months of March through May; bi-weekly from May through August; and began a monthly cadence in September.

17. In March, the Department of Agriculture and FSIS repeatedly assured the public that the domestic food supply chain would continue to operate without disruption and in particular that lack of availability of inspectors would not cause a plant to shutter. On March 16, for example, the Department said it was committed to the “timely delivery of services to maintain the movement of America’s food supply from farm to fork,” and that it was “prepared to utilize [its] authority and all administrative means and flexibilities to address staffing considerations.” Attachment H. Similarly, on March 20, FSIS issued guidance that said the agency “seeks a united effort with our industry partners in preventing the spread of COVID-19 while continuing to produce safe food for consumers.” Attachment I.

18. Congress also authorized additional funding for FSIS operations during this time period so that FSIS could support continued operations. On April 3, FSIS told industry that it had “received additional funding for increased expenditures associated with executing the FSIS mission during the pandemic.” Attachment J.

19. Another area that FSIS worked with Tyson as well as the rest of the meat and poultry industry was to provide regulatory discretion around a labeling requirement.⁵ This was needed by industry as sales during the pandemic shifted from food service to retail. FSIS understood the urgency of permitting the products to be available for sale and did not delay the shipments with unnecessary regulatory burden.

⁵https://www.fsis.usda.gov/wps/wcm/connect/ea0747a8-682e-492b-9d9a-2d79415cf13a/SpecialAlert03232020.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ea0747a8-682e-492b-9d9a-2d79415cf13a

Conflicting State and Local Regulation

20. Throughout March and April, Tyson worked with federal officials to continue safely operating and to follow evolving CDC guidance. Notwithstanding a national emergency and the longstanding, exclusive federal oversight of meat and poultry processing facilities, state and local public health authorities sought to impose their own authority with respect to those facilities, and in some instances, they claimed the authority to shut down the facilities. The conflict between federal authority versus state and local authority eventually led to an Executive Order from the President on April 28. The Order explained that “recent actions in some States have led to the complete closure of some large processing facilities. Such actions may differ from or be inconsistent with interim guidance recently issued by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services and the Occupational Safety and Health Administration (OSHA) of the Department of Labor.” See Exec. Office of Pres., *Executive Order on Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19*, 85 Fed. Reg. 26,313, 26,313 (Apr. 28, 2020). Attachment K.

21. The President’s Executive Order reconfirmed for Tyson the supremacy of federal regulators and federal directions with respect to critical infrastructure and provided important assurance that there would be consistent, uniform directions going forward. The President specifically directed the Secretary of Agriculture “to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA.” *Id.* As directed by the FSIS in the May 8, 2020 Constituent Update, Tyson continues to work closely with local and state health authorities including providing tours of facilities to better enable their understanding of the full implementation of the CDC Guidance document

for Meat and Poultry Processors.⁶

22. All attachments are true and correct copies.

Executed this 13 day of November, 2020, at Washington, D.C.

By: Barbara Masters
Barbara Masters

⁶ [https://www.fsis.usda.gov/wps/wcm/connect/01e26ddd-900f-4e86-9868-76f005c5ec3f/Con-
stUpdate050820.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=01e26ddd-900f-4e86-9868-
76f005c5ec3f](https://www.fsis.usda.gov/wps/wcm/connect/01e26ddd-900f-4e86-9868-76f005c5ec3f/Con-
stUpdate050820.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=01e26ddd-900f-4e86-9868-
76f005c5ec3f)